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No. 80-1950

In The Supreme Court of the United States

OCTOBER TERM 1980

VINCENT E. MARINO, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Vincent E. Marino respectfully submits this reply brief in support of his petition for a writ of certiorari and in opposition to the brief submitted by the United States.

SUMMARY OF ARGUMENT

In his petition for a writ of certiorari, Mr. Marino argued that the panel's decision was demonstrably incorrect (Pet. 5-17),* that it conflicts with the practice in every other district that has prosecuted cases under 18 U.S.C. § 660 (Pet. 17-20), and that the decision distorts the relationship between Section 660 and other sections of the federal criminal code (Pet. 20-21). In its response, the Government attempts to support the correctness of the panel's decision by semantic legerdemain and selective references that emphasize rather than rebut the significance of Mr. Marino's argument. The Government then attempts to diminish the importance of an admitted conflict in practice among prosecuting districts by arguing, in essence, that this Court should simply tolerate the unprecedented interpretation adopted by the Southern District of New York and by no other district. With respect to Mr. Marino's demonstration that the panel's decision reverses the relationship of Section 660 to other criminal sections, the Government makes no response and apparently has none.

ARGUMENT

I. The Decision of the Panel is Plainly Incorrect

The Government's principal defense of the panel's decision consists of misstating the panel's holding. The Government now contends that "both the federal prosecutor in the Southern District of New York and the court of appeals acknowledged that Section 660 requires proof that the funds embezzled arose in whole or in part from interstate or foreign commerce" (G.Br. 8). Depending on what the Government intends this ambiguous statement to mean, it is either untrue or meaningless.

The thrust of Mr. Marino's argument, from the time of his pre-trial motion to the present petition, has been that

* "Pet." refers to Mr. Marino's petition, and "G.Br." to the Government's brief in opposition.

Section 660 requires an independent and direct link between the embezzled funds and commerce; any other interpretation conflicts with the legislative history and renders the second jurisdictional requirement superfluous. While the panel stated that "the statute requires that the embezzled funds themselves be connected with foreign or interstate commerce, not that the funds be connected to a business which is engaged in commerce" (Pet. A-12), a statement upon which the Government now heavily relies, it specifically undermined this language by emphasizing that the second link between the embezzled funds and commerce was satisfied if the embezzlement was merely from the general funds of a common carrier:

> "The correct focus is on the connection between the funds of the common carrier and foreign or interstate commerce and not between the funds and some particular transaction in commerce."

(Pet. A-10).* Thus, despite its general disclaimer, the panel permitted the conviction to stand when the only allegation or proof that the embezzled funds themselves "arose from" interstate or foreign commerce, as required by the statute, was the showing that the embezzled funds derived from the general funds of Prudential Lines. Indeed, the Government cannot dispute, and tacitly accepts the fact, that every single element of the fraudulent scheme from which the funds were generated took place in New York State. (Pet. 2-3). The panel's holding thus establishes that in the Second Circuit, embezzlement from general funds of a carrier suffices to meet *both* the first and the second jurisdictional requirements of Section 660.

Apart from its attempts to camouflage the actual holding of the panel, the Government is reduced to distorting or

* In the Court of Appeals, the Government squarely took the position that a link between the embezzled funds and any general funds of a carrier, without more, satisfied the second jurisdictional requirement. Indeed, the relevant heading of its brief, at p. 22, stated "The Required Nexus With Commerce Is Satisfied By Funds Converted From A Carrier's General Reserves."

selectively interpreting the statute, its legislative history, and the canons of interpretation.

A. The Legislative History.

The Government's only response to Mr. Marino's elucidation of Section 660's legislative history is to claim that the references to the legislative debates were "selective", G.Br. 9 at n.8, and to assert in a general fashion that the "cited debates do not support petitioner's sweeping assertion." G.Br. 9. The simple answer to this is that the Court is invited to read the legislative debates in their entirety.* These debates, which cannot be discussed in detail here because of limited space, show in the clearest possible fashion that both the supporters and the detractors of Section 660 did not intend the statute to reach embezzlements, even from the general funds of a common carrier engaged in commerce, unless there was some direct and independent link between the embezzled funds and commerce. See, e.g., 51 Cong. Rec. at 14036 (remarks of Senator White) ("I believe Congress has the power to make it an offense to steal property on a railroad car or steamboat *while being carried from one state to another*") (emphasis added).

Furthermore, the two specific portions of the legislative history that the Government does address are clearly misinterpreted by the Government and in fact support Mr. Marino. The Government's response to the dialogue between Senator Cummins and Senator White, reproduced at page 10 of the petition, is to claim that the debate reflected a concern that "thefts directed against intrastate manufacturing operations might not lie within the purview of federal criminal legislation", G.Br. 10, at n.8. This observation simply makes no sense when compared with the senators' actual remarks. Both in the initial Cummins-White colloquy and in the subsequent "wife beating" remarks quoted at Pet. 10 at n., the point of the senators' remarks was not that the legislation might impermissibly extend to "thefts directed against intrastate manufacturing operations," as the Government

* The debates were reproduced *in toto* as pages 670-699 of the Joint Appendix in the Court of Appeals.

suggests, but rather reflected their view that the theft had to relate directly to property that "was in process of transportation from one state to another." In short, in this and in many other portions of the debate that the Government chooses to ignore, the senators unmistakably required a direct link between the embezzled funds and commerce, and not merely a link between the general funds of a common carrier and commerce.

B. Canons of Interpretation.

In his petition, Mr. Marino pointed out that two canons of interpretation squarely support his reasoning. The Government responds to only one of these arguments, and even in this its logic is wanting.

As previously demonstrated, Pet. 12-14, the panel's interpretation of Section 660 renders the second jurisdictional requirement, which was the product of a long and unusually careful congressional debate, virtually meaningless: as a matter of logic and experience, the general funds of any corporation "engaged in commerce as a common carrier" must derive, at least "in part," from such commerce. If Congress had intended merely to require an indirect link to interstate or foreign commerce, as the Government now suggests, the second jurisdictional requirement would add nothing to the first. Since words in the statute should not be construed as excess verbiage, it follows that the Government's interpretation of Section 660 is incorrect. See Petition at 12-13.

The Government's only response to this is to claim that "one can readily imagine circumstances in which a carrier may engage in intrastate operations, as well as interstate or foreign ones, and maintain the funds from such local operations in an account distinct from other funds." G.Br. 10. This brand-new theory, never previously advanced by the Government, borders on being frivolous. While one can theoretically postulate a situation where a corporation "engaged in commerce as a common carrier" might also engage in intrastate commerce and keep a separate account for revenues from such activities, one cannot "readily

imagine" that this occurs with any frequency. More fundamentally, the issue never appears in any of the extended debates on Section 660 that led to the addition of the second jurisdictional requirement. Indeed, the length and the seriousness of the senators' remarks demonstrate that the issue they were considering was something far more fundamental than the elimination of a remote possibility. Rather than avoiding the impact of a theoretical accounting procedure, as the Government now contends, the senators in 1914 obviously were wrestling with what to them appeared to be a significant question of their constitutional powers under the Commerce Clause. As the panel conceded, the senators resolved their doubts by adding a second jurisdictional requirement to Section 660. The Government's attempt to characterize this thoughtful constitutional debate as a discussion of a remote theoretical issue is absurd.

Equally significantly, the Government chooses not to respond to Mr. Marino's demonstration that the rule of lenity articulated in *United States* v. *Bass*, 404 U.S. 336 (1971), and its progeny squarely applies to this case. Both aspects of the *Bass* decision—that is, its holding that an ambiguous statute should be interpreted in favor of a defendant, and its statement that the courts will not lightly interfere with the federal-state balance, see Pet. 13-14—require rejection of the Government's interpretation. Whatever the basis for the Government's tortured reading of Section 660, it cannot and does not argue that Section 660 *unambiguously* criminalizes embezzlements from the general funds of a common carrier. Particularly since Congress showed throughout its lengthy debate that altering the federal-state balance was precisely what it wanted to avoid, the *Bass* decision squarely supports Mr. Marino. The Government's decision to avoid any attempt to distinguish *Bass* is understandable and revealing.

The Government then suggests that whatever the deficiencies in the indictment, proof, and jury instructions, they did not "substantially impair[ ] petitioner's rights—a question not even addressed by the petition." G.Br. 8 (footnote omitted). This statement simply reflects an appalling

failure to read Mr. Marino's petition. As Mr. Marino demonstrated at some length, Pet. at 15-17, relying on decisions the Government has chosen not to address or distinguish, the indictment did not allege a crime, the facts alleged at trial did not show an independent link with commerce as demonstrated in every other opinion under Section 660 in which the facts are set forth, and the charge to the jury did not reflect the requirements of the statute. Given this pervasive misinterpretation of the statute, to which the Government doggedly adhered even after the issue was raised before trial, it is difficult to imagine an error more prejudicial to Mr. Marino.

Furthermore, the Government's claim that there was no prejudice to Mr. Marino is particularly ironic in the context of this case. The indictment upon which Mr. Marino was tried was the fourth in a series of superseding indictments against him, and even the final indictment was redacted on the motion of the Government during the trial. The Government thus demonstrated that it had no compunction about revising or superseding the indictment if necessary. Why, then, did the Government adamantly refuse to redraft the Section 660 allegations of the final indictment when the issues presented in this petition were squarely raised by Mr. Marino long before trial? If the issue had been nothing more than an incidental question of drafting, as the Government now claims, nothing would have been easier than to recast the indictment to meet the requirements of the statute. The reason the Government did not do so is clear, and emphasizes both the incorrectness of its interpretation and the prejudice to Mr. Marino. As the Government knew, and as the facts proved at trial, every incident of the alleged embezzlement scheme took place within New York State. Pet. 2-3. Unlike every other Section 660 prosecution for which records exist, see Pet. 16-17, there was no travel or communication of any kind across a state line during the planning or execution of the alleged scheme. The Government thus knew that if it alleged that the embezzled funds had been "arising or accruing from, or used in, such commerce," it would be called upon to prove such a link and be found wanting. Rather

than highlighting this lapse in its proof, the Government chose to camouflage the issue by adhering to its unprecedented and anomalous interpretation of the statute.

In short, the Government's interpretation of Section 660 was clear and prejudicial error. The panel's decision should be reversed.

2. The Decision in this Case Conflicts with the Practice in Every Other District that Has Used Section 660

As the Government grudgingly acknowledges, the factual showing upon which Mr. Marino's conviction rests and the allegations set forth in the indictment conflict with the factual showings and with the indictments in every single Section 660 prosecution outside the Southern District of New York for which records exist. See Pet. 16-20. Indeed, the Government—which has records of its own to check the categorical statement made by Mr. Marino in his petition that his conviction is unique in these respects—makes no attempt to show that a single prosecution in Section 660's sixty-seven year history has been based upon an indictment or factual showing such as those found sufficient in this case. Rather, the Government chooses to dismiss this embarrassing issue with a single page of off-hand platitudes at the end of its brief. G.Br. 11.

As before, the Government's principal response is that the Second Circuit panel did not mean what it said, and that the Court "held that Section 660 does require that the funds embezzled be linked to commerce, and not merely that they be linked with a firm that participates in transactions in commerce." *Id.* As stated, the panel in fact held squarely to the contrary, see pages 1-2, *supra.* The Government next claims that the panel's decision is "unlikely to provoke the defiant reaction [from the prosecutor] forecast by petitioner." *Id.* This glib statement ignores the fact, demonstrated in Mr. Marino's petition at 19, that the prosecutor in New York City has deliberately resurrected Section 660 as a prosecutorial tool, and has *already* persisted in its unique interpretation of the statute even after the issues presented in this petition were squarely raised by Mr. Marino.

Finally, the Government attempts to foreclose review of the panel's decision by pointing out the obvious, that is, that there is "no conflict among the courts of appeals" on this issue. *Id.* For the reasons set forth in Mr. Marino's petition at 19-20, to which the Government does not respond, this reasoning is illogical and pernicious. As the Government tacitly concedes, the reason there is no "conflict among the courts of appeals" is precisely because in every prosecuting district for which records exist, the prosecutor has properly alleged both jurisdictional requirements of Section 660 and has proven a direct link between the embezzled funds and commerce. There is no "conflict" because the prosecutor's correct interpretation in every other district has obviated the need (and the jurisdiction) for an appeal by a convicted defendant. The Government's attempt to hide behind this obvious jurisdictional fact and claim it as a lack of "conflict" simply does not address the fact that the practice tolerated in this case conflicts with the practice in every other district in the country.

3. The Panel's Decision Creates an Unwise and Unintended Policy in the Administration of the Federal Criminal Laws

In the third part of Mr. Marino's "Reasons for Granting the Writ," Pet. 20-21, he demonstrated that the panel's decision reverses the relationship between Section 660 and other statutes, passed many years after Section 660, that have far more liberal jurisdictional requirements. The importance of this point cannot be overemphasized, although the Government's only response is to ignore it.

The principal reason for the Government's and the panel's continued inability to grasp the significance of Mr. Marino's argument is that they have failed to recognize that Section 660 had its genesis in 1914, at a time long before Congress's exploration and utilization of its expansive powers under the Commerce Clause. For example, the panel stated that the Senate debate read as a whole demonstrated that "Congress intended the 'arising requirement' to mean that the funds must be derived from or used in commerce in such a way that theft of the funds *has an adverse effect on*

foreign or interstate commerce." Pet. A-10 (emphasis added). This statement, and others like it that permeate the panel's opinion and the Government's brief, are based on a lack of historical perspective. The "effects test" for determining Congress' power under the Commerce Clause was not established by this Court until the New Deal era in *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). Neither the Government's reasoning nor the panel's acceptance of it reflects the view of legislative power under the Commerce Clause that motivated Congress in 1914.

As set forth in Mr. Marino's petition at 20-21, the prosecutor could undoubtedly have chosen to use the more modern and familiar provisions of the wire and mail fraud statutes or the Travel Act had the alleged scheme involved the use of a single interstate telephone call, a single use of the mail, or a single trip across state lines. The Government appears to concede that in this case even those modest jurisdictional requirements could not be met. But the Government cannot and understandably does not attempt to defend the anomaly created by the panel's decision, which allows the prosecutor to use an older and far more restrictive statute in factual circumstances where more modern and widely applicable federal statutes do not apply.

CONCLUSION

This Court's last and only occasion to review Section 660 was in *United States* v. *Cook*, 384 U.S. 257 (1966), more than fifteen years ago. The issue decided in that case, whether an unincorporated business was included within the phrase "firm, association or corporation," was of far less significance than the issues presented here. For reasons that the Government cannot successfully rebut, the panel's decision in this case means that a prosecution such as that of Mr. Marino is tolerated in one district when neither the drafting of the indictment nor the sufficiency of proof would have been permitted in any other district. If Mr. Marino's activities had occurred any place other than in the Southern District of New York, this prosecution would not have taken place.

Federal prosecutors are now resurrecting Section 660 as a prosecutorial tool. Pet. 17-20. The application of this archaic statute by the most active prosecuting office in the country in a manner flatly inconsistent with its application every place else should be reviewed by this Court.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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